UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES
April 13, 2021
5:15 p.m.-7:15 p.m.
Via Webex

Mr. John Lund, Presiding

MEMBERS PRESENT	MEMBERS EXCUSED	GUESTS	STAFF
Melinda Bowen	Adam Alba	Jacqueline Carlton	Keisa Williams
Teneille Brown	Tony Graf		Minhvan Brimhall
Deb Bulkeley	Chris Hogle		
Sarah Carlquist	Jennifer Parrish		
Mathew Hansen			
Ed Havas			
Hon. Linda Jones			
John Lund, Chair			
Hon. Richard McKelvie			
John Nielsen			
Nicole Salazar-Hall			
Hon. Vernice Trease			
Hon. Teresa Welch			
Hon. David Williams			
Dallas Young			

---

1. WELCOME AND APPROVAL OF MINUTES:

John Nielsen moved to approve the February 9, 2021 meeting minutes as written. Dallas Young seconded and the motion passed unanimously.

2. URE 507.1 back from public comment:

Ms. Williams: URE 507.01 is back from public comment. No comments received. SB 53 passed and will go into effect July 1, 2021. The Department of Health is still working on the BEST guidelines. It's unclear at this time whether they'll have those in place prior to July 1st.

Following committee discussion, Mr. Lund asked Ms. Williams to reach out to Nick Stiles to determine whether the Court would prefer to wait on approving the rule until we have a corresponding effective date for the DoH guidelines.

3. Supreme Court Conference update:

- URE 512 (out for public comment)
- URE 1101 (out for public comment)
- URE 106 (SC sent back to Committee)

Mr. Lund: URE 512 and URE 1101 were approved for public comment.

Judge Welch: My email in the meeting materials highlights what happened at the Supreme Court conference.

Supreme Court Conference Summary on URE 106:

- The Court emphasized that they were very appreciative of the memo. They liked having both the majority and minority perspectives.
- The Court doesn't want the Committee to feel wedded to any Utah case law that might be affecting our views or votes. They prefer that the Committee focus on getting the policy of the rule right.
- The Court asked a few main questions:
    1. Should oral and written statements be treated differently?
    2. How much does this rule trump? If it's a trumping rule, is it only allowing inadmissible hearsay, or does it trump other rules such as privileges, etc.?
    3. For what purpose does the remainder come in? Is it for the truth of the matter asserted or for context only? Is that something the trial court judges decide, or will the rule make that explicit?
- The Court seemed to be concerned with the language, "reasonably necessary to qualify, explain, or place into context." I explained that the reason that language is included in the rule is because it's the way caselaw defines fairness. I got the sense they thought it was clunky and it may be partly why they didn't want the Committee to feel wedded to caselaw.
- The Court asked the Committee to find out more about what's transpiring with the federal rule.

Judge Welch: Justice Lee connected me with Professor Daniel Capra, who is the reporter for the federal committee. The federal committee is meeting on April 13, 2021 and will be voting on whether or not to approve a proposed rule and note. If so, it will be sent out for public comment. If approved, it won't be effective until December 1, 2023.

Today's meeting packet includes the federal rules committee meeting notes from their last meeting, and the memorandum that Professor Capra prepared in preparation for their upcoming meeting. The proposed rule is on page 44 of the memorandum. Their rule applies to written and oral statements, and it would permit otherwise inadmissible hearsay. Both the Utah and proposed federal rule allow otherwise inadmissible hearsay, but they diverge as follows:

- The Utah rule addresses what is necessary and sufficient and whether you have to introduce the remainder as an exhibit at trial, or whether it is enough to refer to it in cross-examination.
- The proposed federal rule doesn't get into that issue.
- The federal rule allows oral statements. That's not something we considered.

The note to the federal rule states that the uses to which a completing statement can be put depends on the circumstances. In some situations, it's coming in for context, but in other situations, it's for the truth of the matter asserted. The rule itself doesn't change much, they've just added a sentence at the end regarding oral statements. The note fleshes out what the rule is doing.

Issues that may be relevant to the policy debate the Court would like this Committee to address can be found on pages 27-44 of the memoranda. Are there certain policy considerations that stand out to anyone? If so, the subcommittee can talk through those together and with Professor Capra.

Ms. Carlquist: I would be interested in hearing what Professor Capra thinks of the "subject to rule 403" language in the Utah rule.

Ms. Bulkeley: The federal rule seems too broad. It's important to consider whether we would be letting in statements that have more prejudicial effect or that really should be excluded. The parties could start using this rule of completeness to get in any part of any statement. If it's going to trump the hearsay rule, it should be limited to only what is needed to be fair. I like the 403 limitation.

Mr. Lund: This may be more process than policy, but it's important to recognize that we're ahead of the pack. While adding clarity to the question of the rule of completeness is important, I think ours is a somewhat narrower implementation, which leaves trial courts with the ability to craft a solution around the need to complete the evidence in a way that makes sense in their particular application. Those seem like useful principles to keep in mind.

Let's plan on having a substantive discussion on URE 106 at our next meeting on June 8th. It would be interesting to hear Professor Capra's reaction to some of our proposed language, and how it may correspond with the deliberations that the federal committee has already had. It would be useful for the subcommittee to compare and contrast the Utah rule with the proposed federal rule and meet with Professor Capra to the extent that would be helpful.

4. URE 404(b) Doctrine of Chances:

Judge Welch reviewed the memo and materials in the committee packet. The memorandum explains the rule, the committee note, and the recommendation regarding a model jury

instruction on the doctrine of chances (DoC). The memorandum highlights the debate and differing opinions.

Ms. Brown: I don't support making the change because I think it violates 404(a). The DoC requires propensity reasoning. We can add tests and put a lot of gloss on that, but it's inconsistent with rule 404(a). Narrowing it might provide better guidance for judges, but it also doubles down on, or endorses, the idea that it is a permissible 404(b) use and I don't think it is. I think we're creating more confusion by trying to elaborate on 404(b) exceptions, which are not actually exceptions. We are developing doctrine under 404(b) that doesn't fit under 404(b). If they want to keep it, then we should provide them with tools so that judges in the future have more clarity about what the standards are for the DOC and it's not such a free-for-all. The root of the problem is that it's doctrinally incoherent.

Probability and propensity are predictions about the future, based on how someone has behaved in the past. I don't think there is a logical difference between the two. I think we're parsing words. Objective probability isn't different from propensity because rule 404(a) doesn't distinguish between the two. If we want to provide doctrinal clarity, we should say this is an exception to 404(a), rather than saying it's a permissible non-propensity use and here's the way judges can figure out if it fits. Instead, we say this is a rule that allows propensity reasoning so it's an exception to 404(a), along the same lines as sexual assault history. That would be clear.

I would recommend moving it out from under (c) and creating a new subsection (d): "Evidence of rare events that occur with unusual frequency may be admitted under the doctrine of chances."

Judge Welch: I think there's value in having Ms. Brown flesh that out in the memo.

Judge Williams: If we added a standalone 404(d), we could also move some of the information from the committee note to define "rare events."

Ms. Carlquist: In some ways, that's more intellectually honest. Everybody knows this is just really good propensity evidence. I also like the idea of titling (d) "rare events," to encourage some kind of inquiry into whether the event is actually rare.

Mr. Young: This really boils down to propensity evidence. From a policy standpoint, are we going to continue to acknowledge that a person should be convicted for what he's done, not who he is? I think we ought to stick to that. Does the doctrine still have a place in helping to prove mens rea? The majority of the time, it's going to be used to prove actus reus. You're just dressing up propensity evidence and sometimes bringing in a statistician to put impressive 1 in 50 billion numbers on it.

Ms. Carlquist: I agree. The doctrine really only makes sense when applied to the kind of evidence that's quantifiable or subject to probabilistic reasoning, like lottery fraud cases or accidental fires. If you can't discern any sort of data or quantifiable metric, we're just relying on intuition.

Ms. Brown: Even if it's a statistical probability, you're still drawing an inference that this person is the kind of person who does X, and it doesn't need to be connected to bad character or an immoral character trait. Assuming we had purely statistical data about the likelihood that one individual would be struck by lightning twice or the likelihood that someone would have three wives accidentally drown in a bathtub, there is still a very immediate inference that you're the kind of person who drowns your wife, so it can't be an accident. It's either accidental or intentional. That is a mutually exclusive mens rea. By proving that something is not an accident, you are inferring a mens rea of culpability.

Mr. Nielsen: In response to Mr. Young's comment, I understand the distinction between something that happens to you and something that you do, but often that will be the very question at trial. The bride in the bathtub case is the perfect example. Having your wife die is something that happens to you, in a sense. It's a loss that you suffer. However, if you're the one being accused of killing your wife, then that's something you did. I don't think that distinction breaks down under these circumstances because that's the very question the factfinder needs to decide. It's not the kind of question you can resolve prior to seeing the evidence. It's a jury question. That's why I advocated for including it under 404(b). I understand Ms. Brown's position. It's very much like Judge Harris' position. Judge Harris believes, philosophically, that you can't make non-propensity inferences from statistical evidence. I disagree.

Judge Williams: I am somewhat persuaded by Ms. Brown's comment that while some people may get it, the majority of our jurors may not. I think it opens up the door to appellate arguments about what the jury and/or judge were really doing. From this side of the bench, clarity is more important.

Mr. Lund: Is the committee, as a whole, ready to approve sending this memo and rule draft to the Supreme Court. It will go up along with a resubmission of our 404(d) memo and a brief cover memo. I anticipate a fairly substantive discussion with the Court about the very issues that are being discussed now, and the rule will likely be sent back to us with further direction.

Mr. Neilsen moved to approve the memo and rule draft (as amended) and advance it to the Supreme Court, along with the memo on 404(d) and a brief cover memo. Judge Williams seconded the motion and it passed unanimously.

After further discussion, Mr. Lund asked Ms. Brown and Judge Welch to attend the Supreme Court Conference to present both sides of the issue.

5. URE 504 Subcommittee:

Ms. Salazar-Hall: The subcommittee considered several options, but determined that it was easier to add to the definition of "lawyer" than to add the definition of "licensed paralegal practitioner" (LPP). Removing "lawyer referral service" throughout the rule made it much cleaner. We pulled the definition of LPP from rule 15-701.

Ms. Bowen: Ms. Parrish and I reviewed the rest of the rules to see if "lawyer" was used anywhere else, or whether LPPs might be implicated. Only a couple of other rules include the term "lawyer" and those weren't relevant to LPPs. The language, "any other person or entity authorized by the state of Utah to practice legal services," is meant to cover entities in the regulatory sandbox.

Judge Williams: To the extent there are concerns that the definition of lawyer is being expanded, the purpose of this rule is to try to protect privileged communications. The rule does not attempt to define "lawyer" so much as it attempts to define what's privileged.

Judge Williams moved to recommend URE 504, as drafted, to the Court for public comment. Ms. Brown seconded and the motion passed unanimously.

6. URE 506 Physician and mental health therapist-patient:

Mr. Young: The chair of the Advisory Committee on the Rules of Criminal Procedure, Doug Thompson, reached out to me because he stumbled across a referral to the Evidence Committee in *State v. Bell* regarding an exception to the physician-patient privilege. It looks like this slipped through the cracks.

The issue the court charged us to review concerns the exception to the physician-patient privilege that exists when there's a communication relating to the physical, mental, or emotional condition of the patient, when that condition is an element of any claim or defense. I'm most familiar with that cropping up in a case where an alleged victim has gone to counseling and defense attorneys want to get into it because of the potential for exculpatory information in terms of inconsistent statements or recapitulation. The Utah Supreme Court didn't rule on it in *Bell*, but it discusses a U. S. Supreme Court case where the alleged victim's therapy records were in the possession of the State and delivered to the district court, but the records were never reviewed. The U.S. Supreme Court remanded it back to the district and said, because those records originally came into the State's possession and may have implications, the records must be reviewed for anything that could be helpful to the defense and a determination made as to whether they need to be disclosed.

Not long after that, the Utah Supreme Court decided *State v. Cardall* where they keyed on the *Pennsylvania v. Ritchie* decision and developed the evidentiary standard for access. There are a

couple of steps in the process. If the defense wants to get access to therapy records or physician-patient records, they must file a motion and show, to a reasonable degree of certainty, that the records they're after are going to contain helpful information. The challenge was that that standard is too restrictive, and it poses a due process violation. I think what the Court is grappling with is how to balance the important policy reasons for having a robust physician-patient privilege, as that's defined in the rule, versus a clear explanation for what's required.

The question for us is whether they should stick to their guns or whether we can find a middle ground. They are looking to us to identify a clear definition of "reasonable certainty," while also balancing the defendants' rights. I recommend creating a subcommittee to take a closer look at various approaches. I spoke with Doug Thompson to gauge whether there was any appetite on the part of the Criminal Rules Committee to be involved because of URCrP 14. He was open to it if we felt there was a strong need. Depending on how this goes, it could involve the criminal rules committee as well.

Mr. Lund: Another issue the Court identified was the need for clarification about whether the government is the holder of the records at some particular point. One variable to consider is that this rule would apply in other settings where a subpoena could be issued directly to a therapist's office (perhaps in a family law case). The element of a claim or defense is not necessarily just applicable in a criminal context. That might be something to think through a bit. Victims' rights are an important aspect as well, so the subcommittee might want to reach out to victim advocates and see if they have any input.

Ms. Salazar-Hall: I could see this being relevant to a personal injury case or other civil cases outside of domestic, so we may want to ask someone in the plaintiffs' bar for an opinion.

After further discussion, a URE 506 subcommittee was created with the following members:

- Ms. Salazar-Hall
- Mr. Hansen
- Mr. Nielsen
- Mr. Young
- Ms. Carlquist

The meeting adjourned at 6:45 p.m. **Next Meeting: June 8, 2021, 5:15 pm, Webex video conferencing**